Louisiana Law Review

Volume 27 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Symposium
April 1967

Private Law: Expropriation

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EXPROPRIATION

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Litigation in the field of expropriation law has increased substantially during recent terms of court, attributable in substantial part to the taking of land necessary to highway programs. However, other condemnation proceedings have not lagged, with the increased needs for installations by municipalities, port authorities, river authorities, and the continuing needs of levee districts.

The extent to which lands adjacent to lakes and rivers, but not fronting thereon, owe a public servitude, and can hence be appropriated without compensation, was before the Supreme Court in *Jeanerette Lumber & Shingle Co.*[1] The Third Circuit had refused relief to a landowner on the ground that Civil Code article 665 permitted such appropriation of all lands "within the range of the reasonable necessity of the situation as produced by the forces of nature unaided by artificial causes." The Supreme Court held that only lands which were riparian when separated from the state were burdened with such a servitude; if title cannot be traced to a riparian tract to which the servitude attached, damages are recoverable in accordance with the expropriation laws of the state.[2]

In *Bowie Lumber Co.*,[3] on the other hand, there was found no inherent power in a pipeline company to condemn property; however, a certification of convenience and necessity from the Federal Power Commission authorizing the construction of the pipeline between two towns was deemed sufficient delegated authority to expropriate necessary property.[4] As to location of servitude, the First Circuit adopted encyclopedic jurisprudence to the effect that the grantee of eminent domain power has the right to determine and such determination will not be interfered

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1. Jeanerette Lumber & Shingle Co. v. Board of Com'rs, 249 La. 508, 187 So. 2d 715 (1966), *amending and affirming* 181 So. 2d 415 (La. App. 3d Cir. 1965), noted 27 LA. L. REV. 321 (1967).

2. 187 So. 2d at 719-20. While policy is not discussed by the court, the holding is one clearly in favor of spreading the levee burdens, subject, however, to the rather erratic effect of the size and location of original grants from the public domain.

3. Texas Eastern Transmission Corp. v. Bowie Lumber Co., 176 So. 2d 735 (La. App. 1st Cir. 1965).

4. *Id.* at 738.

with if made in good faith and not capricious or wantonly injurious; merely proving that another route is feasible is not sufficient to establish lack of good faith or abuse of power.[5]

The Third Circuit Court had a somewhat novel problem posed for them by the "taking" involved in lands to be flooded through the construction of the Toledo Bend Dam and Reservoir.[6] Lands in question were found to have a present value for leasing because of exploration for oil and gas in the area. While the Authority argued any such value was too speculative to permit the award of damages, the Third Circuit nonetheless decided that evidence supported severance damages to retained mineral rights in the amount of $11.00 per acre.[7] This was found to be current lease value potential according to the evidence, and such lease value would be entirely lost by deep water coverage and limitations on drilling for oil and gas imposed by the Authority on mineral rights reservations. The possibility of directional drilling in this area was not discussed.

The great importance of determinations of "highest and best use" of property expropriated was well illustrated, again in the Third Circuit, in a taking for transmission-line right-of-way.[8] The land in question bordered a river, but being unused timberland was valued by the taker at only $200.00 per acre. Landowner, however, adduced evidence to show that some of the land had a present market for industrial purposes but the comparable sales adduced as evidence of such industrial value were sales, mainly, to pipelines. The trial judge excluded such comparables on the assumption that, being made under threat of expropriation, they were not voluntary sales and hence not usable as evidence. The Third Circuit disagreed, noting that, while not necessarily controlling, such sales are nevertheless to be considered as evidence of value in the absence of other sales and, in any event, are superior to merely theoretical calculations as to the worth of average timberland.[9] Consideration being given to such

5. 29a C.J.S. *Eminent Domain* 376, § 91.
6. Sabine River Authority v. Salter, 184 So. 2d 783 (La. App. 3d Cir. 1966).
7. *Id.* at 788. In Sabine River Authority v. Jordan Miller, 184 So. 2d 780 (La. App. 3d Cir. 1966) and Sabine River Authority v. Ross Miller, 189 So. 2d 603 (La. App. 3d Cir. 1966), the court found severance damages to be $15 per acre. Writ granted on another point, 190 So. 2d 914 (La. 1966).
8. Gulf States Utilities Co. v. Norman, 183 So. 2d 421 (La. App. 3d Cir. 1966), *writ refused* 249 La. 118, 185 So. 2d 529 (1966).
9. 183 So. 2d at 427.

sales, an average value of $500.00 per acre was fixed by the court.[10]

The condemnor fought another losing battle on the river front in the *Burden* case,[11] the property in this case being destined for highway right-of-way. Condemnor took some 14 acres from a 1016-acre tract, depositing an award of approximately $550.00 per acre, without severance damages. The evidence demonstrated to the trial court a value of $1000.00 per acre on the basis of testimony that the tract could be sold for industrial use if put on the market. Condemnor's argument that the record was barren of evidence of interest in the tract for industrial purposes was presumably deemed countered by the testimony of a realtor that the property "will be sold if it's offered on the market within a reasonable length of time and it will be a reasonable purchase at $1000.00 per acre."[12] Despite the fact that the tract was already bisected by pipeline, powerline, and railroad right-of-way, further bisection by a highway was believed to sever the tract for industrial purposes and reduce the value of the remainder away from the river from $1000.00 to $550.00 per acre while enhancing the value of the river front remainder to $1750.00 per acre. Condemnor argued in brief that the damages testified to for the owner were "wholly illusory, problematical, and too speculative." The trial judge noted, in awarding severance damages, that he had "no way of determining severance damages except to follow the testimony of an expert."[13] Condemnor and court agreed that "the correct law" directed that "market value must be determined according to the highest and best use thereof, provided that a market or demand therefor be shown with reasonable certainty in not too distant future."[14]

In still another taking of river property, damages were said by condemnor to be conjectural and merely consequential, arising from discomfort, disturbance, and injury to business and hence not to qualify as severance damages.[15] Nonetheless, owner was able to prove that installation of a railroad spur, essential to the potential industrial use of the property would cost $38,400

10. *Id.* at 431.
11. State v. Burden, 180 So. 2d 784 (La. App. 1st Cir. 1965).
12. *Id.* at 789.
13. *Id.* at 791. See also State v. Neyrey, 186 So. 2d 705 (La. App. 4th Cir. 1966), *writ refused* 249 La. 706, 190 So. 2d 230 (1966).
14. 180 So. 2d at 785, citing State v. Hedwig, 133 So. 2d 180 (La. App. 4th Cir. 1961).
15. State v. Phillips, 180 So. 2d 879, 881 (La. App. 1st Cir. 1965).

more than prior to a highway right-of-way taking. This was accepted as substantially measuring the severance damage in the absence of any contrary evidence by condemnor.[16] The cost of relocating buildings to provide parking space taken for right-of-way has also been held to measure severance damages.[17]

An estimate based on practical knowledge and experience in real estate and farm operations was accepted as sustaining, in the absence of comparable sales data, severance damages of 25 per cent in value of farm land due to a highway bisecting tract of riceland and rendering bisected tracts uneconomic for separate irrigation.[18] On the other hand, the First Circuit peremptorily rejected a percentage decrease approach to severance damages based, not on expert opinion, but on trial judge's use of percentage figures culled from a supposedly similar case.[19] The "burden of establishing severance damages," the First Circuit said, "rests upon the owner."[20] The court quoted further from an encyclopedic treatise to the effect that "severance damages cannot be presumed and unless the owner of the remaining property shows by competent evidence that the value of his remaining land has been diminished by the taking, compensation will be limited to the value of the land actually taken."[21]

In the *Singletary* case,[22] the land actually expropriated from "prestige" residential property was valued at the nominal sum of $1025.00. However, it was taken in order to construct an expressway ramp which exposed the owner to a substantial flow of traffic immediately adjacent to the residence. The owner's appraiser estimated that the value of the property had decreased $38,000.00 due to the expressway installation, including in his estimate of decrease, the loss of view resulting from the expressway bridge across the lake. The court said, "Loss of view per se is not compensable as a separate item of damage, but nevertheless is an element of damage and may be considered by the appraisers in estimating or determining the commercial value

16. *Ibid.* In Cleco v. Williams, 181 So. 2d 844 (La. App. 2d Cir. 1965), the cost of modifying radio equipment on mobile farms units made necessary by installation of powerline was deemed to measure part of severance damages.

17. Dow v. State, 179 So. 2d 666 (La. App. 2d Cir. 1965). See also State v. Adams, 184 So. 2d 744 (La. App. 2d Cir. 1966).

18. State v. Gielen, 184 So. 2d 737 (La. App. 3d Cir. 1966).

19. Gulf States Utilities Co. v. Hatcher, 184 So. 2d 326 (La. App. 1st Cir. 1966).

20. *Id.* at 331.

21. *Ibid.* See also Cleco v. Dunbar, 183 So. 2d 111, 117 (La. App. 1st Cir. 1965); State v. Tessitore, 178 So. 2d 501, 508 (La. App. 1st Cir. 1965).

22. State v. Singletary, 185 So. 2d 642 (La. App. 1st Cir. 1966).

of the property remaining after expropriation."[23] It would seem generally immaterial to the owner whether or not it is a separate item of damages if he has other severance damage with which it can be combined as an element and counted in the total.[24]

In 1964, in the *Kendall* case,[25] a suit for consequential damages based on the constitutional provision that "property shall not be taken or damaged" without compensation, a claim for "loss of use and enjoyment" of a lake was unsuccessfully made. The court recognized that a physical invasion of real property was not indispensable to a claim for damages and proceeded to award damages for sand and dirt which had washed into an artificial lake from a nearby highway right-of-way, filling it with silt, rendering it unusable for fish cultivation, and necessitating its drainage. Absent comparable before and after values from which to measure the damage, the trial court accepted, as evidence of damage, the cost of repairing the damage. But the Second Circuit excluded $1000.00 awarded by the trial court for "loss of the use and enjoyment of the lake," since such loss of use would have no effect on market value.[26]

Where severance damages, computed on the basis of a percentage decrease in the market value before the partial taking, were complained of as inadequately compensating for esthetic losses, the Third Circuit noted that "under the prevalent jurisprudence the owner is not entitled to compensation for non-economic consequential injuries such as discomfort, disturbance, or loss of value in expropriation proceedings . . . unless such

23. *Id.* at 647-48. The encyclopedic treatise relied upon, while noting recovery for interference with *easements* of view, also notes that "in order to recover for interference with . . . view because of the relocation of a street or highway, the owner must have a right in the nature of an easement in that particular street or highway." 29A C.J.S. *Eminent Domain* 432, § 105(2). See, however, Patin v. City of New Orleans, 233 La. 703, 66 So. 2d 616 (1953); Harrison v. Louisiana Highway Comm'n, 202 La. 345, 11 So. 2d 612 (1942); Carter v. Louisiana Highway Comm'n, 6 So. 2d 159 (La. App. 2d Cir. 1942) recognizing impairment of view as an element of damage without this limitation.

24. The cited treatise actually goes only so far as to state that "easements of light, air, view, and access have only a nominal value apart from the abutting property, the real injury suffered by the owner lying in the effect produced on his abutting lands by the wrongful interference with the easements, and their value is measured not by the value of the easements, separately, but by the damage which the property sustains in consequence of their loss, and the effect of such loss on the market value." 29A C.J.S. 718, § 167.

25. Kendall v. State, 168 So. 2d 840 (La. App. 2d Cir. 1964).

26. *Id.* at 845. However, the inability to "use and enjoy the lake" would be clearly lost during the period of repair and would thus in a very real sense be damages.

consequential damages diminish the market value of the property."[27]

In a pipeline right-of-way condemnation,[28] severance damage was sought to be minimized by the condemnor on the ground that the right-of-way land was still largely available for use by lot owners; but evidence of presence of pipeline as depreciating factor in other subdivisions supported landowner. Condemnor sought also to minimize severance damages to potential rural homesites by decreasing assumed lot size, but was held bound by an earlier Supreme Court finding of specific lot size to be the highest and best use of the land, which finding had become, on remand, the "law of the case."[29]

The Third Circuit also had occasion, in *Comeaux*,[30] to note that "physical invasion of real property . . . is not indispensable to the infliction of damages, within the meaning of . . . the Louisiana Constitution." However, a claim for consequential damages to a tract of land separate from the tract partially taken was rejected where the owner could not show that the damages were special to him and not sustained by the neighborhood generally.[31] On the other hand, the same court stated in *Miller*[32] that benefits may be offset against damages where an actual increase in value is shown (although it found no such increase present there) even though several owners are so favored by the improvement; the benefit is nonetheless "special" to each of the favored owners rather than "general" to the community as a whole.[33]

A rather disingenuous use of the term "general benefits" was attempted in *Anding*,[34] where a partial taking occurred which rendered a portion of the remainder valueless because without access. However, the highway contractor used dirt from this tract, paying the owner at the rate of $1000.00 per acre, a transaction which occurred after the suit to expropriate was

27. State v. Babineaux, 189 So. 2d 450, 453 (La. App. 3d Cir. 1966).
28. Texas Gas Transmission Corp. v. Broussard, 177 So. 2d 145 (La. App. 3d Cir. 1965).
29. *Id.* at 146.
30. Gulf States Utilities Co. v. Comeaux, 182 So. 2d 187 (La. App. 3d Cir. 1966).
31. *Id.* at 189.
32. State v. Miller, 182 So. 2d 155 (La. App. 3d Cir. 1966).
33. *Id.* at 157, citing City of Natchitoches v. Cox, 135 So. 2d 302 (La. App. 3d Cir. 1961).
34. State v. Anding, 189 So. 2d 445 (La. App. 3d Cir. 1966).

filed. The owner argued against offsetting such sums against severance damage on the theory this was a general benefit since the dirt could have been purchased from any of several affected owners! The court rejected any solution in the context of "benefits" and instead applied La. R.S. 48:453 directing that severance damages be determined as of the time of trial; on this basis, the court reasoned that the remainder which had been valued at $4250.00, with severance damages at $2550.00 at the time of taking, had since brought in excess of such value and such excess must be credited against the award.[35] The provision for valuation at the time of trial was designed to mitigate severance damages (or increase them) on the basis of events occurring after the taking and up to the time of trial, which trial could take place more than a year after the project was completed.[36] Such were the events here which turned potential severance damages of $2550.00 from the highway construction into an opportunity to sell dirt from the land for twice its original value.[37]

The First Circuit had occasion to incorporate some federal jurisprudence on proof of "highest and best use" of property in the *Nastasi* case.[38] Condemnor argued that, since zoning restrictions prevented commercial use of property at the time of taking, it could not therefore be so valued. The court found no Louisiana authority on the point but was persuaded to adopt the federal rule to the effect that "if there is a *reasonable possibility* that the zoning classification will be changed, this possibility should be considered in arriving at the proper value."[39] Adequate proof that such a possibility existed was deemed to consist in the fact that a comparable property in the neighborhood had been successfully rezoned for commercial use.[40] The same court indicated that, where property was sought to be valued on the

35. *Id.* at 448-49.

36. Under LA. R.S. 48:451 (1950), any defendant may apply for a trial to determine the just and adequate compensation to which he is entitled, provided he files an answer within one year from the date he is notified in writing of the final acceptance of the project by the Department ofHighways. Under La. R.S. 48:453, damages will then be determined as of the time of trial. See Darsey, *Expropriation by Ex Part Order*, 26 LA. L. REV. 91, 102-03 (1965) for experience under these provisions.

37. Here, no delay was sought in the determination of damages; the sale of dirt occurred after suit was filed but prior to time of trial.

38. City of Monroe v. Nastasi, 175 So. 2d 681 (La. App. 2d Cir. 1965), *writs refused*, 176 So. 2d 450, 248 La. 117 (1965).

39. 175 So. 2d at 683, citing United States v. Meadowbrook Club, 259 F.2d 41 (2d Cir. 1958).

40. *Ibid.* See also City of Monroe v. Corso, 179 So. 2d 696 (La. App. 2d Cir. 1965); Annot., 9 A.L.R.3d 291, 313 (1966).

assumption that the property could be sold as a unit for a single integrated business operation, there must be a showing of reasonable prospects for such use; the fact that it was suitable for such use, and testimony that the "general area will have a transition of use to a much higher type use during the coming few years," was not a foundation for such higher type use at the time of taking.[41]

One of the complexities of valuing potential subdivision property has been the proper allowance for time lag in the sale of individual lots; this factor was given consideration recently by the Third Circuit in noting approvingly that, where there is no present market for individual lots, such property must be "valued as a whole, as if sold to a developer for resale who would . . . make proper allowance for interest on his investment while waiting for sales, expected profits, development costs, sales commissions." However, the court was persuaded that in the case before it, where there was a present market for tracts smaller than the whole, where their best use and value were clear, and where there were "essentially no development costs," a wholesale price was not appropriate.[42]

Louisiana has a statute which declares that, in estimating value of property expropriated, it shall be done "without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."[43] When applied to the taking of frontage property incident to widening an existing highway, where the property taken is part of a larger tract which will have the same frontage on the newlywidened right-of-way, the paradoxical result is reached that the condemnor must pay for taking away a benefit which it immediately reconfers but may nonetheless take no credit therefor against the award.[44] On the other hand, if severance damages are claimed

41. State v. Maggio, 178 So. 2d 802, 804 (La. App. 2d Cir. 1965). See also Texas Eastern Transmission Corp. v. Bowie Lumber Co., 176 So. 2d 735, 741 (La. App. 1st Cir. 1965): "The mere fact that this property possesses attributes found desirable or actually required for industrial use does not ipso facto render . . . property in its highest and best use industrially."

42. Lake Charles Harbor & Term. Dist. v. Prestridge, 182 So. 2d 334, 337-38 (La. App. 3d Cir. 1966).

43. LA. R.S. 19:9 (1950).

44. State v. LeDoux, 184 So. 2d 604 (La. App. 3d Cir. 1966); State v. Bertrand, 184 So. 2d 611 (La. App. 3d Cir. 1966). The court deems the rule settled by the refusal of writs in State v. Landry, 171 So. 2d 779 (La. App. 3d Cir. 1965) and the statement by the Supreme Court that "on the facts found by the court of appeal there appears no error of law in its judgment." 247 La. 676, 173 So. 2d 541 (1965).

in connection with such a taking, special benefits conferred on the remainder by the improvement may be offset.[45] Thus, the overall compensation could differ as to similar tracts of land depending on the way in which the claim is made. The condemnor sought to temper the results in *LeDoux* by estimating the award as a pro rata portion of the entire tract valued on an average basis, but the Third Circuit rejected the approach.[46]

This term brought to the First Circuit the *Cockerham* case,[47] involving valuation of the interest of a property owner and his two lessees, a case significant because of the use of the "gallonage" approach in determining the value of a service station lessee's interest.

The trial court accepted expert testimony that the *total* property was properly valued at $167,507, such value being established by comparable sales data for the land and engineering valuation of improvements on the basis of reproduction cost new less estimated depreciation.[48] The trial court accepted, as the value of the *landowner's* interest, the value of the land plus the capitalized value of the contract rents exceeding six per cent on such land value, or a total value for the landowner's interest of $147,960. The court accepted a valuation for first lessee's interest of some $16,000, arrived at by discounting the excess of economic rent over contract rent to present value on the basis of compound discount at six per cent per annum;[49] the trial court assigned the balance of the value for the total property, or $3500, as the value of the second lessee's interest.

Condemnor's appraisers estimated no lease advantage for the second lessee, but the lessee's appraisers estimated such value at from $50,000 to $71,000. Potential economic rent was calculated as what a purchaser of the lease would pay based on the gallonage currently pumped at the station, such estimated monthly rent ranging up to $1050.00 per month, or some $450.00 per month in excess of contract.[50] Apparently, the trial court rejected this valuation as too speculative.

45. Louisiana Highway Comm. v. Grey, 197 La. 942, 2 So. 2d 654 (1941), followed in Parish of E.B.R. v. Edwards, 119 So. 2d 175, 178 (La. App. 1st Cir. 1960).

46. 184 So. 2d at 609.

47. State v. Cockerham, 182 So. 2d 786 (La. App. 1st Cir. 1966), *writ refused* 249 La. 110, 185 So. 2d 219 (1966).

48. 182 So. 2d at 797.

49. *Id.* at 787 and 797.

50. *Id.* at 801.

On appeal, second lessee persuaded the First Circuit that the lease advantage was not properly valued at $3500. Second lessee's expert had testified that the maximum monthly rental of $1050.00 could be supported on the basis of the gallonage pumped, assuming certain improvements were added, and had discounted this excess over lease rent to present value using an eight per cent discount factor, presumably using eight percent because of the speculative character of the estimate. A substantial expense factor was also allowed by the expert in connection with such increased rentals and the present value of the improvements to be made during the lease deducted. Thus the expert arrived at a $50,000 valuation.[51] The First Circuit accepted $450.00 per month as the lease advantage but was persuaded that such advantage was so non-speculative as to warrant discount at six per cent rather than the eight per cent used by the expert; that no expense allowance would be necessary; and that the higher rent could be realized without the stipulated improvements. On these favorable assumptions, the First Circuit calculated that the lease advantage was not $3500.00 as the trial court had found, nor $50,000 as the lessee's expert had estimated, but almost $70,000.[52] The Supreme Court refused writs, two members of the court dissenting.[53]

In *Thieler*,[54] the Fourth Circuit rejected a claim for moving expenses, in this case by the owner, noting that, "in expropriation proceedings mere consequential damages arising from disturbance or injury to business is *damnum absque injuria*."[55]

What could be an important procedural point in suits brought to recover damages *after* a taking was decided in landowner's favor at this term by the Fourth Circuit.[56] An earlier expropriation suit resulted in an award and final judgment for land taken, reserving to landowner his right "by proper proceeding" to assert any further claim for damages. Some three years later, a

51. *Ibid.*

52. *Ibid.* The First Circuit cited State v. Levy, 242 La. 259, 136 So. 2d 35 (1962), where however the Supreme Court reversed a decision of the Second Circuit holding that, although there was no evidence that expropriated premises could be rented for more than the contract rent, there was nonetheless value for the lease on the bald assumption that the premises should be rented for a 12 per cent return and that the resulting excess over contract rent represented lease advantage without discounting present value. State v. Levy, 129 So. 2d 516 (La. App. 2d Cir. 1961). See also State v. Ferris, 227 La. 13, 78 So. 2d 493 (1955).

53. 249 La. 110, 185 So. 2d 219 (1966).

54. City of New Orleans v. Thieler, 181 So. 2d 56 (La. App. 4th Cir. 1965).

55. *Id.* at 59.

56. Petrovich v. State, 181 So. 2d 811 (La. App. 4th Cir. 1966).

petition for damages was filed in the proceeding and was met with an exception to the court's jurisdiction, which was maintained because of the previous final judgment. The petition, it was argued, was a new suit for damages to which the state had not consented. A second suit was also dismissed. On appeal, the Fourth Circuit rejected the plea to the jurisdiction, holding failure to caption a pleading "supplemental" should not be fatal to the court's jurisdiction to hear a later claim for damages resulting from an expropriation;[57] the constitutional provision against taking or damaging "has long been held to permit recovery against the state, without the necessity of the state's consenting to suit, for damages resulting to property beyond that actually expropriated." However, having found jurisdiction, it sustained other exceptions and remanded the cases to permit amendment of the pleadings; a cause of action for damages, if it could be stated, would lie only against the United States under the federal-state agreement which provides only for indemnification from the state in the event of successful suits against the United States.[58]

TORTS

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From the many tort cases decided by the Louisiana appellate courts during the past term, the writer has selected for discussion a few which represent new interpretations of the law or applications of recent tort theory, or which present an occasion for discussing new trends in other jurisdictions.

Defamation of a Public Official

In March 1964 the United States Supreme Court decided the case of *New York Times v. Sullivan*,[1] holding that the first amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge that

57. *Id.* at 813.
58. *Id.* at 814.
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1. 376 U.S. 254 (1964).